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NO. 81-2299

In the Supreme Court of the United States

OCTOBER TERM, 1981

HARRY'S HARDWARE, INC.
Petitioner

versus

JAMES C. PARSONS,
SUPERINTENDENT OF POLICE, ET AL

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR CERTIORARI

RENE LEHMANN*
LAWRENCE M. LEHMANN
332 Chartres Street
New Orleans, Louisiana 70130
(504) 525-0815
Attorneys for Petitioner,
Harry's Hardware, Inc.

* Counsel of Record

Of Counsel
Midlo & Lehmann

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-6555

QUESTION PRESENTED FOR REVIEW

May a State Sunday Closing Law, without violating the Equal Protection Clause of the 14th Amendment, prohibit hardware stores from opening on Sundays and permit drug stores and groceries to be open on Sundays and to sell not only medicine and food but also most of the items constituting the stock in trade of hardware stores.

PARTIES TO THE PROCEEDING

1. Harry's Hardware, Inc., a Louisiana Corporation

2. James C. Parsons, former Superintendent of Police of the City of New Orleans

3. Harry Connick, District Attorney for the Parish of Orleans, State of Louisiana

4. William Guste, Attorney General, State of Louisiana

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28 U.S.C. 1257(3) 2

IN THE
SUPREME COURT OF THE UNITED STATES

NO.

HARRY'S HARDWARE, INC.
Petitioner

versus

JAMES C. PARSONS,
SUPERINTENDENT OF POLICE

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

The Petitioner, Harry's Hardware, Inc., petitions that a Writ of Certiorari be issued to review the opinion and judgment of the Supreme Court of Louisiana rendered in these proceedings.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court (Appendix "A", *infra*) is reported at 410 So. 2d 735. The reported decision indicates that petitioner's application for rehearing was denied on March 19, 1982. The opinion of the Court of Appeal, 4th Circuit, State of Louisiana (Appendix "B", *infra*) is reported at 399 So. 2d 632. The reasons for

judgment of the state trial court (Appendix "C", *infra*) are not reported.

JURISDICTION

(i) The decision of the Supreme Court of Louisiana here sought to be reviewed was rendered on January 25, 1982.

(ii) The order of the Supreme Court of Louisiana denying petitioner's request for a rehearing was rendered on March 19, 1982.

(iii) The jurisdiction of this Honorable Court is invoked under 28 U.S.C. 1257(3).

STATUTES IN QUESTION

Louisiana Revised Statutes, LSA-RS 51:191, 192 and 194 (Appendix "D", *infra*).

STATEMENT OF THE CASE

Petitioner, Harry's Hardware, Inc., operates several large hardware stores in the City of New Orleans. In its stores, petitioner sells a wide range of merchandise ranging from light bulbs to swimming pool chemicals, from lawn care products to watches, from pots and pans to tools including paper goods, cleaning supplies, kitchen products, as well as the more standard hardware items. Petitioner's chief competitors are the large chain drug stores operating in

New Orleans, and, to a lesser extent, the large chain grocery stores. Petitioner contends that the large drug stores sell essentially the identical merchandise which is sold by petitioner except that petitioner does not sell drugs and medicine. Similarly, most of the non-food items carried by grocery stores are also sold by petitioner. Petitioner does not sell food.

Section 191 of Title 51 of the Louisiana Revised Statutes (Appendix "D"), originally enacted in 1886, requires all businesses in Louisiana to be closed from midnight Saturday to midnight Sunday, but Section 192 of said title exempts drug stores and "public and private markets" from the effects of Section 191. Consequently, the large chain drug stores who are petitioner's direct competitors are permitted, by Louisiana law, to be open on Sundays. Petitioner, not being exempt from the Louisiana Sunday Closing Law, is forced to close on Sundays. Section 194 of Title 51 of the Louisiana Revised Statutes (Appendix "D") adopted in 1962, establishes a narrow list of merchandise which exempt stores are prohibited from selling. Rather than restricting exempt stores to the merchandise giving rise to the exemption, *e.g.* drugs and food, the Louisiana statute permits an exempt business to sell its entire stock of merchandise with the exception of the specific items listed in Section 194. This leads to the result that in Louisiana, on Sundays, hardware, which is not a prohibited item, may be lawfully sold by drug stores or grocery stores, but not by hardware stores. The result is that petitioner loses a substantial portion of its market share by being forced to close on Sundays while its competitors, the large drug and grocery stores, are per-

mitted to be open and to sell the identical merchandise carried by petitioner.

Alleging that this Louisiana statutory scheme deprives it of the Equal Protection of the Laws guaranteed by the 14th Amendement to the United States Constitution, petitioner brought this action to enjoin the enforcement of the Louisiana Sunday Closing Laws against petitioner. The case was tried on affidavits. The affidavits submitted by petitioner support petitioner's contention that in the three to five mile trading area of each of petitioner's locations there are a total of 16 major drug and grocery stores which carry the same merchandise as plaintiff, that in one instance such a drug store is directly across the street from one of petitioner's stores, and that all of these competitors of petitioner are open for business on Sundays. (Opinion intermediate Court of Appeal, Appendix "B", p. B-14) The only affidavit submitted by respondents was an affidavit by the Superintendent of Police of the City of New Orleans to the effect that he is enforcing and will continue to enforce the Sunday Closing Laws.

The trial court dismissed petitioner's action, considering itself bound to the latest previous expression of the Louisiana Supreme Court with reference to Sunday Closing Laws, *State v. Scallon*, 374 So. 2d 1232 (La. 1979). On appeal to the Louisiana Court of Appeal for the Fourth Circuit, the trial court was reversed and the issuance of an injunction ordered, the Court holding that petitioner is in a business similarly situated to groceries and drug stores and that, to

permit drug stores and grocery stores to be open on Sundays and sell their non-drug and non-food stock while hardware stores carrying the same and/or similar merchandise are required to be closed, constitutes invidious discrimination against hardware stores and that, for this reasons, the Louisiana Sunday Closing Law is unconstitutional.

On appeal to the Louisiana Supreme Court by the respondents, that Court by a four to three decision reversed the intermediate Court of Appeal and dismissed petitioner's action, holding that the discrimination of the Louisiana Sunday Closing Laws against hardware stores is the result of rational legislative scheme, and that this discrimination against hardware stores is not rendered unconstitutional because of the fact that drug stores and grocery stores are permitted to sell non-drug and non-food items on Sundays. Three justices dissented, and two separate dissenting opinions were filed.

HOW FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

In its petition filed in the State Trial Court, petitioner alleged the following:

> 15.
>
> "Petitioner avers that the Sunday Closing Law invidiously discriminates between persons and corporations in the same business namely the hardware, home center and garden center business

> by permitting certain companies to open its stores on Sundays while requiring others, such as petitioner, to keep its stores closed, all of which deprives petitioner of the equal protection of the law, in violation of its rights under the Constitution of the United States and of the State of Louisiana."

The Trial Court held (Appendix "C", *infra*):

> "the Court is unable to find that the facts, as stated — the law written — and any inequities which do exist — are sufficient to declare the Act unconstitutional, especially based upon the jurisprudence as it now exists."

The intermediate Court of Appeal declared the Louisiana Sunday Closing Law to be unconstitutional (Appendix "B", *infra*), stating:

> "The Constitution of the United States, while forbidding the State from engaging in discrimination where that discrimination is invidious, does not require that a statutory discrimination be set aside if any state of facts reasonably may be conceived to support it. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective.
>
> The distinction between hardware stores and grocery/drugstores is arbitrary and without any relation to public health, recreation and welfare. If the pur-

> pose of the statute is prevention of unfair competition, then that purpose has failed in reality....
>
> We hold that LA. R.S. 51:194, the Sunday Closing Law, is manifestly unconstitutional and that a permanent injunction should issue as prayed for. For the foregoing reasons the judgment of the District Court is reversed and set aside and this matter is remanded for issuance of the permanent injunction in accordance with the views hereinabove expressed. All costs are to be paid by appellees."

By a 4:3 majority, the Supreme Court of Louisiana overruled the intermediate State Appellate Court, (Appendix "A", *infra*), holding that:

> " Each of the exemptions provided by the Sunday Closing Law is rationally related to the State's objective in enacting such a statute. The discrimination suffered by the plaintiff's hardware stores is a by-product of a rational legislative scheme whereby the leisure and recreation of the populace is fostered without concomitant deprivation of access to essentials such as food and medicine. This discrimination does not become invidious merely because those drug and grocery stores which are allowed to remain open may also sell non-food and non-drug items."

ARGUMENT

In deciding that the Louisiana Sunday Closing Law may without violating the Equal Protection Clause of the 14th Amendment to the United States Constitution, require a hardware store to close on Sundays while permitting drug stores and grocery stores to sell hardware on Sundays, the Louisiana Supreme Court conflicts with the decisions of several other state courts of last resort. *Shag-Way Department Stores Inc., v. City of Omaha*, 179 Neb. 707, 140 N.W. 2d 28 (Neb. 1966), *Allen v. City of Colorado Springs*, 75 P. 2d 141 (Colo. 1938), *Hughes v. Reynolds* 223 Ga. 727, 157 S.E. 2d 746 (Ga. 1967).[1]

These cases all stand for the proposition that, in order for classifications in Sunday Closing laws to be valid, exempt stores may not be permitted to sell on Sundays the stock in trade of non-exempt stores.

In *Shag-Way*, the Nebraska Sunday Closing Law was held to be unconstitutional because it prohibited Sunday sales of clothing and food only by such stores from which

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[1] Many other states have held their Sunday closing laws to be unconstitutional. The latest such decision is that of the Supreme Court of Arkansas in *Handy Dan Improvements Center v. Adams*, _____ S.W. 24 _____ (Ark. 1982). Other such decisions have been listed in *Caldor's Inc. v. Bedding Barn, Inc.* 177 Conn. 304, 417 A.2d 343 (1979) which invalidated the Connecticut statute. These cases differ from the instant case because they all deal with Sunday closing legislation which contains lists of *commodities*, prohibited or exempt. The Louisiana scheme, to the contrary is based on prohibited and exempt *purveyors*.

such goods are ordinarily sold as the main business but permitted Sunday sales of clothing and food by other establishments.

Allen invalidated a Sunday Closing ordinance in Colorado Springs. Like the Louisiana statute here attacked, the ordinance required all stores to be closed on Sundays, exempted drug stores from the operation of the ordinance and permitted drug stores on Sundays to sell not only drugs but their entire inventory of general merchandise. Commenting that the ordinance created a condition whereby drug stores could lawfully sell groceries on Sundays while groceries were prohibited from doing so, it held the ordinance to be violative of the Equal Protection Clause.

Hughes invalidated a Georgia Sunday Closing Law which prohibited the sale of certain commodities on Sundays but permitted prohibited commodities to be sold in stores whose dollar volume of sales of prohibited merchandise was less than 50% of their total sales volume. Stating that this provision permits a store selling a variety of goods to sell an item of furniture on Sundays, but prohibits a furniture store from doing the same, the Georgia Court held its State's Sunday Closing Law to violate the 14th Amendment.

In contrast to the foregoing decisions of the Supreme Court of Colorado, Nebraska and Georgia, the majority opinion of the Louisiana Supreme Court approves a legislative scheme where "hardware" may be sold on Sundays by

drug stores but not by hardware stores and states that the discrimination created by the Louisiana Statute in favor of drug stores and grocery stores and against hardware stores does not become invidious "merely because those drug and grocery stores which are allowed to remain open may also sell non-food and non-drug items."[2] (Appendix "A", p. A-6)

The constitutionality of classificiations in Sunday Closing Laws under the 14th Amendment was analyzed in depth by this Honorable Court in *McGowan v. Maryland* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1961). This Court held that to offend the Equal Protection Clause, classifications must rest on grounds wholly irrelevant to the achievement of the State's objective. Applying this rule to the facts of *McGowan*, this Court approved a statutory arrangement which permitted operators of bathing beaches and amusement parks to sell on Sundays merchandise customarily sold in such establishments — all other merchants being prohibited from selling such (and any other) merchandise. This Court approved the statutory scheme, holding that:

> "a legislature could reasonably find that these commodities, necessary for the health and recreation of its citizens, should only be sold on Sunday by those

[2] The writer of the opinion is in error in implying that only certain drug stores and food stores are exempt from the operation of the Louisiana act. All drug stores are specifically exempt. Grocery stores are exempt as "public and private markets." *State v. Penniman*, 224 La. 95, 68 So. 2d 770 (La. 1954). LSA-R.S. 51:192.

> vendors at the locations where the commodities are most likely to be immediately put to use." 366 U.S. 428.

In the instant case, in contrast to *McGowan*, there is no geographical distinction between the stores that are required to close under Louisiana law and those permitted to remain open. They are all located in the City of New Orleans, and none of the privileged stores possess recreational location attributes such as were found in *McGowan*. Yet, one set of stores is permitted to sell their full range of merchandise (other than the narrow list of prohibited goods under Section 194) and the other set of stores is required to be closed. A 4:3 majority of the Louisiana Supreme Court justifies this discrimination as:

> "the by-product of a rational legislative scheme whereby the leisure and recreation of the populace is fostered without concomitant deprivation of access to essentials such as food and medicine. This discrimination does not become invidious merely because those drug and grocery stores which are allowed to remain open may also sell non-food and non-drug items." (Appendix "A", p. A-6)

There is no evidence in the record to the effect that food and drugs would not be available on Sundays in Louisiana if food stores and drug stores were restricted in their Sunday sales to food and drugs. In his dissenting opinion, Justice Watson aptly summarized the discriminatory

and monopoly fostering effects of the Louisiana statutory scheme on petitioner as follows:

> "Hardware accounts for only 18% of plaintiff's sales. A large volume of its business is in home and garden supplies. Almost every item sold by Harry's Hardware, Inc., is also offered by grocery and drug stores in the New Orleans area. Apart from food and medicine, the stores all sell essentially the same merchandise. The employees of Harry's Hardware made Sunday purchases of eighty-two different items which are also carried in their stock. Walgreens Drug Store offered for sale in a Sunday advertisement at least forty-three items which are carried in stock at Harry's Hardware, Inc. Because drug stores and grocery stores are allowed to open on Sundays and Harry's is not, Harry's has a distinct competitive disadvantage. On a given Sunday, one Harry's Hardware store sold $3,800 worth of merchandise which would allegedly have been permanently lost to neighboring establishments had the store been closed." (Appendix "A", p. A-8)

The Louisiana statutory scheme, thus, is greatly different from the Maryland scheme approved in *McGowan*. In Maryland, the criterion chosen to decide which stores would be exempt from the Sunday Closing requirement was a geographical one: stores located at bathing beaches, bathhouses, amusement parks and dancing saloons were permitted to sell "any merchandise essential to or customarily sold

at or incidental to" such locations. (366 U.S. 454). In Louisiana, by contrast, a drug store irrespective of its location is exempt from the Sunday laws (LSA-R.S. 51:192) and, being exempt may sell on Sundays its (and petitioner's) stock in trade with the exception only of clothing, lumber, building supply materials, furniture, home, business or office furniture, appliances, automobiles or motor vehicle parts. (LSA-R.S. 51:194A). Hardware and tools are not prohibited items, ncr is the majority of the inventory of petitioner.

The recited legislative purpose of the Louisiana statute is to "promote the health, recreation and welfare of the people of this state and to prevent unfair competition among persons, firms or business establishments" (LSA-R.S. 51:194C). Far from achieving this purpose, the Louisiana law has been instrumental in creating Sunday monopolies. The distinction made by the Louisiana statutory scheme between hardware stores and drug stores resulting in the forced closing of the former on Sunday while the latter enjoy a monopoly position does indeed rest on grounds wholly irrelevant to the achievement of the State's objective.

CONCLUSION

Louisiana has adopted a Sunday closing scheme which is unique. Rather than providing for the exemption of specific commodities, it provides for exemption of specific purveyors. These exempt purveyors are not limited in their sales to the goods giving rise to the exemption, *e.g* drugs

and food. This scheme varies significantly from the one upheld in *McGowan*. It is submitted that the Louisiana scheme is utterly incompatible with the equal protection clause of the 14th Amendment to the U.S. Constitution. Accordingly, it is respectfully submitted that a writ of certiorari be issued herein to the Supreme Court of Louisiana.

Rene Lehmann*
Lawrence M. Lehmann
332 Chartres Street
New Orleans, Louisiana 70130
(504) 525-0815
Attorneys for Petitioner,
Harry's Hardware, Inc.

*Counsel of Record

Of Counsel
MIDLO & LEHMANN

CERTIFICATE OF SERVICE

I, Rene Lehmann, hereby certify that I have on June _____, 1982, by United States Mail, postage prepaid, served three copies of the foregoing petition upon all parties required to be served, their names and addresses being as follows:

Salvador Anzelmo, City Attorney
Galen Brown, Deputy City Attorney
City of New Orleans
Room 2W23, City Hall
New Orleans, Louisiana 70112

Hon. Harry F. Connick
District Attorney, Parish of Orleans
Brian Meisner, Assistant District Attorney
Kevin McNary, Assistant District Attorney
John Craft, Assistant District Attorney
619 South White Street
New Orleans, Louisiana 70119

Hon. William J. Guste, Jr.
Attorney General, State of Louisiana
Robert J. Caluda, Staff Attorney
234 Loyola Avenue
7th Floor
New Orleans, Lousiana 70119

_____
Rene Lehmann

APPENDIX "A"
SUPREME COURT OF LOUISIANA

NOS. 81-C-1614 & 81-C-1633

HARRY'S HARDWARE, INC.

VERSUS

JAMES C. PARSONS, SUPERINTENDENT

ON WRIT OF CERTIORARI
COURT OF APPEAL, FOURTH CIRCUIT
PARISH OF ORLEANS

BLANCHE, Justice.

Harry's Hardware, Inc. filed suit in Orleans Parish Civil District Court seeking to enjoin enforcement of the Sunday Closing Law, R.S. 51:191-194. Originally named as defendants were James C. Parsons, then Superintendent of the New Orleans Police Department and Harry Connick, in his capacity as District Attorney for the Parish of Orleans. As the petition attacked the constitutionality of the state statute, William Guste, the Louisiana Attorney General, was later made a defendant.

A temporary restraining order was granted, but following trial on the merits, the plaintiff's suit for permanent injunction was dismissed. On appeal, the Fourth Circuit

Court of Appeal reversed, finding the statute in question manifestly unconstitutional, and remanded the suit for issuance of a permanent injunction against its enforcement. As a state statute was declared unconstitutional, this case comes before us on an appeal of right.

Louisiana's Sunday Closing Law is comprised of four sections under Title 51 of the Revised Statute. Section 191 creates a general prohibition of the conduct of business on Sunday.

Section 192 exempts several types of businesses from the prohibition established by Section 191. Included among the exemptions are:

> Newsdealers and newspaper offices,
> Printing offices,
> Book stores,
> Watering places and public parks,
> Places of resort and recreation,
> Livery stables,
> Railroads,
> Hotels and boarding houses,
> Undertaker shops,
> Art galleries,
> Drug stores and apothecary shops,
> Public and private markets,
> Theatres, and
> Restaurants.

Section 193 requires that barber shops be closed. Section 194(A) prohibits the sale of specific items on Sunday, including:

> Clothing or wearing apparel,
> Lumber or building supply materials,
> Furniture,
> Home or business or office furnishings,
> Household, office or business appliances,
> and
> Automobiles.

Section 194(E) provides an exemption to this prohibition for sales made for charitable, medical or funereal (sic) purposes. Sales within the French Quarter of New Orleans are also exempted.

Section 194(C) states the objectives of the Sunday Closing Law: "[T]o promote the health, recreation and welfare of the people of this state and to prevent unfair competition among persons, firms or business establishments...".

It is undisputed that Sunday Closing Laws are not per se unconstitutional. State legislatures within their general police powers may enact legislation setting aside a uniform day of rest and regulating or restricting sales on that day. *McGowan v. State of Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). The ultimate constitutionality of such a statute can be determined only by an examination of its particular provisions. A closing law may not create

arbitrary and unreasonable business classifications which have no bearing on the public health and welfare considerations that prompted its enactment.

In both lower courts, the plaintiff contended that R.S. 51: 192 creates an arbitrary and unreasonable classification. There is no doubt that drug and grocery stores are treated differently from hardware stores under the law. Drug stores and grocery stores (as public and private markets) may remain open on Sunday, while hardware stores must be closed. Moreover, those drug and grocery stores may sell any item of their inventory not expressly prohibited from sale on Sunday by R.S. 51:194(A).

According to the plaintiff, there is no rational reason for this differing treatment. A majority of the non-food and non-drug items sold on Sunday by the drug and grocery stores are available for sale in plaintiff's hardware stores. The court of appeal found merit in this argument, and declared the Sunday Closing Law unconstitutional for the following reason:

> "To permit drugstores and grocery stores to be open on Sunday and sell their non-drug and non-food stock while hardware stores carrying the same and/or similar merchandise are required to be closed constituted invidious discrimination against hardwares stores and is patently discriminatory."

We cannot agree that any discrimination inherent in the Closing Law is of such an unreasonable and invidious nature as to render the statute constitutionally infirm. Not every discrimination promulgated by statute is unconstitutional. The constitutional safeguard is offended only if the discriminatory classification rests on grounds wholly irrelevant to the achievement of the state's objective.

Unless a statute interferes with the exercise of fundamental personal rights, or is drawn upon inherently suspect distinctions such as race or religion, its constitutionality is presumed and the jurisprudence requires only that the classification challenged by rationally related to a legitimate state interest. *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976).

The statement of legislative purpose in R.S. 51:194(C) expresses a twofold objective: promotion of the health, recreation and welfare of the citizens of this state, and prevention of unfair competition among persons, firms or businesses. To this end, the law provides for a forced day of rest. All businesses must close their doors on Sunday. This statutory requirement is followed by the vast majority of business operations in the State of Louisiana. The plaintiff has presented no evidence that the exceptions to this rule have become broader than the rule itself.

The exemptions created by the statute are those that the legislature deemed necessary to safely provide for the welfare of the public while mandating a forced closing of most businesses. Drug stores and public markets are

exempted to allow the sale of medicine and food on Sunday. Funeral homes may remain open as the inevitability of death cannot be averted on Sunday. The exemptions for theatres, book stores and art galleries are consistent with the intent to provide a day of rest and recreation. Hotels are exempted to provide a place of residence for out-of-town visitors.

Each of the exemptions provided by the Sunday Closing Law is rationally related to the state's objective in enacting such a statute. The discrimination suffered by the plaintiff's hardware stores is a by-product of a rational legislative scheme whereby the leisure and recreation of the populace is fostered without concomitant deprivation of access to essentials such as food and medicine. This discrimination does not become invidious merely because those drug and grocery stores which are allowed to remain open may also sell non-food and non-drug items.

Although the plaintiff demonstrated substantial similarity between the inventory of its hardware outlets and the inventories of present day drug and grocery stores, we do not find that this similarity renders any statutory distinction between hardware stores and food or drug stores arbitrary and unreasonable. While inventories may overlap, drug stores remain primarily retailers of pharmaceutical products and grocery stores remain primarily retailers of food items. To provide public access to precisely these essentials, rather than hardware or other non-food or non-drug items, drug and grocery stores may remain open on

Sunday. We cannot say the legislature acted unreasonably or arbitrarily in treating food and drug stores in a different manner than hardware stores under the Sunday Closing Law.

The objectives behind the Sunday Closing Law were discussed by this Court in State v. Weiner, 161 So.2d 755 (La. 1964). "The legislature, so it declares, enacted the law to promote the health, recreation and welfare of the people by making the first day of the week a day of rest and to prevent unfair competition by those who might choose to work while others rested." Keeping in mind the primary thrust of the statute, to provide a forced day of rest, it becomes apparent that the purpose of the Sunday Closing Law is not the prevention of all unfair competition among businesses. By enacting a general prohibition against the conduct of business on Sunday, the law extends the full benefit of the forced day of rest to merchants and other businessmen who might otherwise feel compelled to remain open.

Those businesses which may remain open on Sunday provide the public with necessary goods or services. Both objectives of the Sunday Closing Law are furthered by closely limiting this class of businesses. The legislature chose not to exempt hardware stores from the general Sunday prohibition. That decision does not render the statute unconstitutional. It is a legislative prerogative to ascertain which stores should and should not be open. That prerogative has not been exercised arbitrarily or unreasonably in this case.

For the foregoing reasons, the decision of the court of appeal is reversed and the injunction prohibiting the enforcement of R.S. 51:191-194 is hereby vacated.

WATSON, Justice, dissenting.

The Court of Appeal correctly held in *Harry's Hardware, Inc. v. Parsons*, 399 So.2d 632 (La.App. 4 Cir. 1981) that the statute discriminates between similar businesses and its classifications are not relevant to any legitimate state objective. In this respect, the Sunday Closing Law is manifestly unconstitutional, warranting permanent injunctive relief in favor of plaintiff.

Hardware accounts for only 18% of plaintiff's sales. A large volume of its business is in home and garden supplies. Almost every item sold by Harry's Hardware, Inc., is also offered by grocery and drug stores in the New Orleans area. Apart from food and medicine, the stores all sell essentially the same merchandise. The employees of Harry's Hardware made Sunday purchases of eighty-two different items which are also carried in their stock. Walgreens Drug Store offered for sale in a Sunday advertisement at least forty-three items which are carried in stock at Harry's Hardware, Inc. Because drug stores and grocery stores are allowed to open on Sundays and Harry's is not, Harry's has a distinct competitive disadvantage. On a given Sunday, one Harry's Hard-

ware store sold $3,800 worth of merchandise which would allegedly have been permanently lost to neighboring establishments had the store been closed.

An individual's right to dispose of private property is subject to reasonable statutory restrictions and the reasonable exercise of the police power. Louisiana Constitution of 1974, Art. 1§4. Legislation creating a uniform day of rest on which business activities are restricted is a reasonable exercise of the police power. *McGowan v. State of Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); *State v. Scallon*, 374 So.2d 1232 (La., 1979).[1] However, laws regulating economic and business concerns must have a rational basis. *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976). A statute cannot invidiously discriminate between those in the same business who properly belong in the same class. *West v. Winnsboro*, 252 La. 605, 211 So.2d 665 (1968). To be constitutional, the classifications in the Sunday Closing Law must have a rational basis. The statute purports to aid the public welfare and prevent unfair competition. LSA-R.S. 51:194(C). The statutory scheme is a reasonable exercise of the police power only if it is relevant to these purposes.

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[1] A contrary view has been expressed. See, for example, the dissent by Justice Douglas in *McGowan*, supra; "Sunday Closing Laws in the United States: An Unconstitutional Anachronism," Vol. XI Suffolk University Law Review 1089; "The Blue Laws Revisited," 36 Albany Law Review 782; "No Crime on Sunday," Sweet & Maxwell's Criminal Law Review, August, 1980, at p. 496; "Sunday Observance Legislation in Alberta," Vol. XII Alberta Law Journal 236.

The statute might rationally distinguish between purveyors of certain goods, medicine and food being items of more immediate necessity than hardware and furniture. However, it does not limit its exceptions to those things necessary or desirable on a day of rest. Why can one buy a house or mobile home on Sunday, but not a car; furniture from a house, but not from a furniture store; car repairs at a service station, but not at a dealer's service department? See *Henderson v. Antonacci*, 62 So.2d 5 (Fla., 1952) and *Rutledge v. Gaylord's, Inc.*, 213 S.E.2d 626, 233 Ga. 694 (1975).

The distinctions between various kinds of business emporiums have become nebulous. Many stores are now of a general purpose nature. Drug and grocery stores no longer limit themselves to drugs and groceries. "To permit drugstores and grocery stores to be open on Sunday and sell their non-drug and non-food stock while hardware stores carrying the same and/or similar merchandise are required to be closed constitutes invidious discrimination against hardware stores and is patently discriminatory." 399 So.2d 638, 639. Harry's Hardware and its competitors, who are allowed to stay open on Sundays, are in sufficiently similar circumstances to make discrimination between them illegal. See *Broadbest v. Gibson*, 140 P.2d 939, 105 Utah 53 (1943); *Spartan's Industries, Inc. v. Oklahoma City*, 498 P.2d 399 (Okl., 1972); *Boyer v. Ferguson*, 389 P.2d 775, 192 Kan. 607 (1964); and *Skag-Way Department Stores, Inc. v. City of Omaha*, 140 N.W.2d 28, 179 Neb. 707 (1966). The arbitrary distinctions drawn in the statutes discriminate against

plaintiff's business.

The statutes do not prevent unfair competition and promote a day of rest. They reflect the fact that some businesses welcome the opportunity for Sunday sales and others do not.[1] Sellers of real estate have a great deal of Sunday activity and want no legislative restrictions. Many in the business of selling furniture prefer that their competitors be forced to close on Sunday. The real basis of the law is economic. See "Sunday Blue Laws: A New Hypocrisy", 54 Notre Dame Lawyer 716. "...[S]uch laws are legislated at the behest of businesses that operate unprofitably on Sunday but are compelled by economic realities to do so because their competitors are doing business..." 54 Notre Dame Lawyer 722. The result is a statutory scheme which discriminates against some merchants who wish to

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[1] Those who do not are represented here by an Amicus Curiae brief on behalf of The Retail Merchants' Bureau, a Division of the Chamber New Orleans and the River Region, D.H. Holmes Company, Ltd., Maison Blanche, a Division of City Stores Company, Universal Furniture, Inc., The Radio Center, Inc., Philip Werlein, Ltd., Krauss Company, Ltd., Mintz Furniture, Inc., Porter-Stevens, Shel-Bar, Inc., d/b/a Lee's Fine Shoes, The Clothes Horse, Inc., Workbench, Inc., Veterans Ace Hardware, Inc., Haspel Brothers, Inc., J.C. Penney Company, Inc., Rubenstein Brothers, Inc., Crane, Inc., The Leon Godchaux Clothing Company, Ltd., Eddie's Ace Hardware, Inc., Bywater Ace Hardware, Inc., New Orleans East Hardware Center, Robbie's Furniture Villa, Inc., The Lamp Post, Inc., J.F. Johnson's, Inc., Kelly Ward's Piano and Organ Shop, Ace Appliances, Inc., Bewley Furniture Company, Inc., Ms. Kay's Ladies and Juniors Apparel, Sun Furniture City, A & A Bourgeois Store, Honeycutt Furniture, Inc., Bart-Wiell, Inc., Sherwood Magnavox Home Entertainment Center, Inc., Jake's Department Store, Inc., New York Hardware & Furniture Company, Inc., Weise-Goldring, Inc., Peyton's Ladies' Apparel, Inc., Wath, Inc., d/b/a Western Auto Associates Store.

engage in Sunday sales and denies them equal protection in violation of the state and federal constitutions. U.S.C.A. Const. Amend. 14,§1; LSA-Const. of 1974, Art. 1, §3; *People v. Abrahams*, 40 N.Y.2d 277, 353 N.E.2d 574, 386 N.Y.Supp.2d 661 (1976); *Kroger Company v. O'Hara Township*, 481 Penn. 101, 392 A.2d 266 (1978); *Caldor's, Inc. v. Bedding Barn, Inc.*, 417 A.2d 343, 177 Conn. 304 (1979) and *City of Ashland v. Heck's, Inc.*, 407 S.W. 2d 421 (Ky.App., 1966). Compare *State v. Target Stores, Inc.*, 156 N.W.2d 908, 279 Minn. 447 (1968); *State v. Hill*, 369 P.2d 365, 189 Kan. 403 (1962); *State v. Anonymous*, 366 A.2d 200, 33 Conn.Supp. 141 (1976); and *Shaggs Drug Centers, Inc. v. Ashley*, 484 P.2d 723, 26 Utah 2d 38 (1971).

The legislature can validly provide necessary and desirable exceptions to a Sunday Closing Law in one cohesive scheme. However, the irrational classifications and exemptions in the Louisiana statutes do not have any reasonable relationship to the public welfare or the prevention of unfair competition. See *Pacesetter Homes, Inc. v. Village of South Holland*, 163 N.E.2d 464, 18 Ill.2d 247 (1960); *State v. Shop and Save Food Markets, Inc.*, 415 A.2d 235 (Vt., 1980); *County of Spokane v. Valu-Mart, Inc.*, 419 P.2d 993, 69 Wash.2d 712 (1966); and *Nation v. Giant Drug Company*, 396 P.2d 431 (Wyo., 1964). The Sunday Closing Law exceeds the legislature's broad prerogatives and should be declared unconstitutional as applied to plaintiff and businesses similarly situated.

I respectfully dissent.

Calogero, Justice, dissenting

For the reasons expressed in the dissent by Justice Watson I am of the view that R.S. 51:191 and 192 are unconstitutional insofar as they prohibit Harry's Hardware and other businesses similarly situated from opening on Sunday and selling the items in their stores not prohibited from sale on Sunday by La. R.S. 51:194.

R.S. 51:194 prohibits the sale of certain merchandise on Sunday and permits the sale of other merchandise. The enactment of such legislation, establishing a uniform day of rest on which business activities are restricted, while perhaps questionable, is not in my view such an unreasonable exercise of the police power as to require a finding of unconstitutionality. There is perhaps a rational basis for the legislation, and the distinctions relative to the merchandise exempt from the Sunday sale prohibition are not clearly arbitrary.[1] However, when La. R.S. 51:191 and 192 are considered along with R.S. 51:194, arbitrary distinctions are created that lack a rational basis and invidiously discriminate against plaintiff and other businesses, which like grocery stores, also sell exempt merchandise.

Under La. R.S. 51:191-192, plaintiff is effectively prohibited from selling any merchandise on Sunday, *even the*

[1] Generally, the items exempt from the Sunday sale prohibition under La. R.S. 51:194 are of a type that are more likely to be needed in an emergency, like food and drugs.

merchandise not prohibited from Sunday sales by La. R.S. 51:194, because those statutes prohibit him from opening his store at all on Sunday. On the other hand, plaintiff's competitors, like the giant supermarkets which carry and sell on Sunday numerous items which plaintiff also carries, are allowed to open and to sell those items on Sunday simply because they also sell food items and are "grocery stores" rather than "hardware stores".

I therefore believe that for the Sunday Closing Laws to be constitutional, any dealer who sells exempt merchandise should be permitted to open, and all stores should be prohibited from selling on Sunday any prohibited merchandise.

There are of course practical problems in enforcing the law and making sure that prohibited merchandise is not sold on Sunday by the open stores. But that problem addresses itself to the Legislature. A reconsideration of the whole "Sunday Blue Law" scheme seems in order.

Nonetheless, as long as stores like the large general purpose super markets can stay open on Sunday and sell exempt merchandise, other stores should likewise be permitted to do so. Practical concerns, like the percentage of a retailer's merchandise which is exempt under the law, or the dollar volume of Sunday business activity, may affect a retailer's choice to close, or open, on Sunday. R.S. 51:191 and 192, discriminatory as they are, should not compel him to remain closed.

APPENDIX "B"
COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

NO. 11,696

HARRY'S HARDWARE, INC.

VERSUS

JAMES C. PARSONS, SUPERINTENDENT OF POLICE, ET AL

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, NO. 80-3488, DIVISION "D", HONORABLE S. SANFORD LEVY, JUDGE.

Denis A. Barry, Judge

Plaintiff, Harry's Hardware, Inc., appeals from a judgment dismissing its application for a Preliminary Injunction prohibiting the New Orleans Superintendent of Police and certain elected officials from enforcing La. R.S. 51:194, commonly referred to as the "Sunday Closing Law". Plaintiff alleges this law is unconstitutional because it invidiously discriminates against its hardware stores by permitting grocery and drugstores to remain open on Sunday selling merchandise similar and identical in nature to that sold by plaintiff.

Sunday legislation originated in A.D. 321 when Constantine the Great issued an edict commanding all Roman judges and inhabitants of cities to rest on the venerable day of the sun. Sunday statutes were passed in England and 29 Charles II c 7 page 412 (1660-1685) has served as the basis for similar legislation in many of our states. Statutes regulating the observance of Sunday were enacted in our country during the Colonial period and included the Virginia Colony at Jamestown in 1617. See 83 C.J.S. Sunday §3a, p. 800 (1953). By 1800, statutes no longer emphasized church attendance, but instead sought to prohibit other activities which removed the temptation to miss religious services.

The United States Supreme Court in *People of State of Illinois ex rel. McCollum v. Board of Education*, 1948, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 and *Everson v. Board of Education*, 1946, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711, holding that the fourteenth amendment protected the individual against any state statute which infringed upon his individual beliefs or convictions, made it inevitable that Sunday legislation would be subject to constitutional attack. The judicial history of the "blue" laws, however, shows they have not generally been interpreted as laws establishing or infringing upon religion, but have been viewed as welfare legislation which provides for a day of rest and relaxation. This premise, in today's society, has limited merit.

Louisiana's Sunday law cannot be upheld upon any

religious concept although it is founded upon the Biblical admonition to "remember the Sabbath to keep it holy," because of our constitutional provision requiring separation of church and state. Amendment 1, Federal Constitution. The constitutionality of our law must be determined upon a consideration of whether it was justified as a proper exercise of the state's police power. Laws similar to ours have been upheld not because of any governmental right to promote religion by legislative enactment, but rather as an exercise of the police power in the protection of all citizens from the physical, as well as moral, degradation which might result from continuous labor.

When the injunction was filed plaintiff obtained a temporary restraining order pending a hearing. Defendants filed an exception of "Lack of Jurisdiction over the Subject Matter" urging that a civil court lacks jurisdiction to enjoin enforcement of a criminal statute. By agreement the preliminary and final injunction were heard together and the matter submitted on affidavits.[1]

The trial judge referred the exception of lack of jurisdiction to the merits and thereafter dismissed plaintiff's petition for injunction, in effect upholding the constitutionality of the Sunday closing law, citing *State of Louisiana v. Scallon*, 374 So.2d 1232 (La. 1979).

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[1] An intervention was filed on behalf of the plaintiff but intervenor has not pursued its position.

In his Reasons for Judgment the trial judge properly held that for a civil court to prevent the enforcement of a criminal statute by injunction, a tripartite test must be met consisting of the following:

(1) The invasion of a property right must be clearly shown;

(2) There must be threat of irreparable injury;

(3) The unconstitutionality or illegality of the statute must be manifest. *National Food Stores of Louisiana, Inc. v. Cefalu*, 280 So.2d 903 (La. 1973); *West v. Winnsboro*. 211 So.2d 665 (La. 1968).

The trial judge opined that plaintiff may be able to establish the first two conditions, but held that plaintiff failed to prove the third condition that the "Sunday closing law" was manifestly unconstitutional.

The right of our legislature to pass a "Sunday closing law" is not open to question. State Legislatures within their general police powers have the right to enact legislation setting aside a day of rest and regulating and restricting sales on that day to protect all persons from the physical and moral debasement which comes from uninterrupted labor. *McGowan v. State of Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).

The first issue we address is the jurisdiction of the civil district court to grant an injunction to prevent enforcement of a criminal statute.

Injunction is an equitable remedy. LSA-C.C.P. Art. 3601. Louisiana district courts have jurisdiction of all civil matters, La. Const. Art. V §16, and are courts of general trial jurisdiction which administer both law and equity. LSA-C.C. Art. 21. When an equitable remedy is sought from a district court in a civil action, the true question is not one of jurisdiction but whether or not the equitable remedy is warranted under the circumstances. *West v. Winnsboro*, supra, p. 669. We are therefore satisfied that the District Court had jurisdiction to hear the petition.

Our next determination is whether an injunction restraining enforcement of LSA-R.S. 51:194 should be issued on the grounds that plaintiff has shown invasion of a property right, irreparable injury, and the manifest unconstitutionality of the statute. If the tripartite test is met then injunctive relief is the proper remedy.

INVASION OF PROPERTY RIGHT

In the equitable protection of property rights, the courts have broadly defined the term "property right". It embraces any civil right of a pecuniary nature. Thus, the right to conduct a business is clearly a property right which equity will protect. The protection extends to any substantial interference produced by unconstitutional legisla-

tion. *National Food Stores of Louisiana, Inc. v. Cefalu*, supra; *West v. Winnsboro*, supra; *Sears, Roebuck and Company v. City of New Orleans*, 238 La. 936, 117 So.2d 64 (La. 1960); *Banjavich v. Louisiana Licens. Bd. for Marine Divers*, 237 La. 467, 111 So.2d 505 (1959); *Dumestre v. Police Jury, Parish of Jefferson*, 185 La. 492, 197 So. 209 (1940); *Patout Bros. v. Mayor, Etc. of City of New Iberia*, 138 La. 697, 70 So. 616 (1916); *McClintock on Equity* §151, p. 402 (2d ed. 1948); de Funiak, *Handbook of Modern Equity* §41, pp. 75-77, (2d ed 1956); 30 *C.J.S. Equity* §58, pp. 897-899; 27 Am.Jur. 2d, *Equity*, §66, pp. 589-590, 28 Am.Jur., *Injunctions*, §70, p. 566.

Plaintiff operates hardware stores and is not exempted from Sunday closing under La. R.S. 51:192 or 194. Hardware stores fall under the general provisions of Section 191 and are prohibited from selling any merchandise on Sunday. Therefore, it is clear that plaintiff's right, a substantial property right, is invaded.

IRREPARABLE INJURY

Plaintiff's name and reputation are in jeopardy under criminal procedures and plaintiff is therefore forced to choose between irretrievable economic loss or being subjected to criminal prosecution.

When unconstitutional ordinances or laws interfere with the pursuit of a lawful occupation, injunctive relief has been granted. See *Sears, Roebuck and Company v. City of*

New Orleans, supra. By "adequate remedy at law" is meant one which is as speedy, efficient, and complete as the remedy in equity. See *Banjavich v. Louisiana Licens. Bd. for Marine Drivers*, supra; de Funiak, *Handbook of Modern Equity* §5, pp. 9-10 (2d ed. 1956); *McClintock on Equity*, §43, p. 103 (2d ed. 1948); 28 Am.Jur., *Injunctions* §39, pp. 534-535.

During the proceedings in the lower court plaintiff demonstrated that closing his business as required by statute causes him irretrievable loss. Plaintiff's affidavits supported its contention that the identical merchandise carried by its hardware stores is being sold on Sundays by drugstores and grocery stores.

Plaintiff's Exhibit A, which was annexed to an affidavit of its Vice-President, sets forth purchases made from plaintiff's competitors. The analysis shows that of 83 different items which were purchased at grocery and drugstores in the area, 82 items were also carried by plaintiff's hardware stores. These 82 items were listed for illustration only since plaintiff's total stock consists of 10,000 different items, many of which are also offered by grocery and drugstores in the New Orleans area. Plaintiff's affidavit further shows that sales at its General Meyer St. store on Sunday, March 16, 1980 (during the temporary restraining order) amounted to $3,800.00. This sum represents 138% of plaintiff's average daily sales. A graphic illustration of irreparable injury was introduction of a Sunday newspaper advertisement by Walgreen's drugstore in which

Walgreen's is referred to as the "Shopper's Center".

Therefore we conclude that irreparable injury was shown.

MANIFEST UNCONSTITUTIONALITY

Plaintiff does not question the legislative prerogative to enact a "Sunday closing law"; its position is that such a statute cannot create arbitrary and unreasonable business classifications which have no bearing upon public health and welfare and which creates and fosters unfair competition.

The "Sunday closing law" is comprised of four sections. Section 191 forbids "all stores, shops, saloons, and all places of public business, licensed under the law of Louisiana or under any parochial or municipal law and all plantation stores from being open and doing business on Sundays." Section 192 (as amended and re-enacted by Act 483 of 1979) exempts from Section 191 the following:

News dealers and newspaper offices
Printing offices
Book stores
Watering places and public parks
Places of resort and recreation
Livery stables
Railroads
Hotels and boarding houses
Undertaker shops

Art galleries insofar as sales of original art and prints constitute a substantial portion of their operation
Drugstores and apothecary shops
Keepers of soda fountains
Public and Private Markets
Dairies
Bakeries
Places of amusement
Steamboats and other vessels
Warehouses for receiving and forwarding freight
Telegraph offices
Theatres
Restaurants
Ice dealers

Section 193 prohibits the operation of barber shops on Sunday. Section 194, Subsection A, provides that the following sales and services shall not be conducted on Sunday:

> "...any clothing or wearing apparel; lumber or building supply materials; furniture; home or business or office furnishings; any household, office or business appliances; new or used automobiles and trucks or parts for and servicing of such motor vehicles in all places of business wherein such motor vehicles are sold. In the case of an emergency, parts and servicing may be sold."

Subsection E of Section 194 exempts sales:

> (1) for charitable purposes; or
>
> (2) of items for funeral or burial purposes; of items sold as a part of or in conjunction with the sale of real property or mobile homes; or of drugs, medicines, medical or surgical supplies and appliances.
>
> (3) of clothing or wearing apparel, new and used furniture, new and used home or business or office furnishings, or any new or used household, office or business appliances in the Vieux Carre section of the city of New Orleans being that section of the city bounded by Iberville Street, North Rampart Street, Esplanade Avenue and the Mississippi River. Added by Acts 1972, No. 72 §1. Acts 1972, No. 547 §1. Amended by Acts 1977, No. 190 §.

Drugstores are listed in Section 192 and fall within the exempted class. Grocery stores are exempted under "public or private market" as decided in *State v. Penniman*, 68 So.2d 770, 224 La. 95 (1953). In *Penniman*, the defense urged (1) that since the legislature failed to define the term "market", the statute was too vague, and (2) that it is unconstitutional because neither the classification or the exemptions therein are founded upon any reasonable distinction and had no logical relation to the statute's objec-

tive. The court held that in light of commonly accepted meanings of the words "public and private markets" it could not say defendant was not within the meaning and contemplation of this statute, otherwise the act would be unconstitutional. Having reached this conclusion it was unnecessary for the court to discuss the constitutionality of the statute.

Before *Penniman*, supra, *State v. Fernandez*, 39 La. Ann. 538, 2 So. 223 (1887) was the controlling jurisprudence. There it was asserted that Section 3 of Act 18 of 1886 did not apply to public and private markets, and, as the grocery establishment in question was in a public market, the opening of a grocery stand in such a place of business on Sunday was not prohibited. The court held grocery stores in public markets were not exempt, because it would not suppose that the legislature designed a statute which odiously and unconstitutionally discriminated between citizens belonging to the "same class". The court in *Penniman*, however, decided the *Fernandez* case was factually distinguishable.

The question of whether a hardware store could legally open on Sunday as a "public or private market" has never been decided by the court, *State v. Gerstenberger*, 260 La. 145, 255 So.2d 720)La. 1971); *State v. Deutch*, 245 La. 819, 161 So.2d 730 (La. 1964). See also *Pick's Auto Parts No. 2, Inc. v. Hodge's Auto Parts*, La. APp. 334 So.2d 547, 548 (4th Cir. 1976). This point is not urged by plaintiff and we find it unnecessary to address this issue.

In summary, plaintiff urges that the "Sunday closing law" violates their right to equal protection of the law on the grounds that (1) the exceptions and exemptions of Sections 192 and 194 create classification of proscribed activities and goods which is arbitrary and unconstitutional; (2) that the "Sunday closing law" is so riddled with exceptions that the present state of the law invidiously discriminates between persons similarly situated, selling the same goods; (3) that the classifications established by the legislature rests on grounds wholly irrelevant to the achievement of the state's objective, namely, the promotion of health, recreation and welfare and creates unfair competition among persons, firms or business establishments similarly situated; (4) that since no public purpose is served it is an abuse of legislative authority.

The Constitution of the United States, while forbidding the state from engaging in deliberate discrimination where that discrimination is invidious, does not require that a statutory discrimination be set aside if any state of facts reasonably may be conceived to support it. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. *McGowan v. State of Maryland*, supra.

The legislative body has a wide latitude in classifying commodities and businesses in this type of legislation. But such statutes cannot invidiously discriminate between those in the same business who properly belong in the same class. *West v. Winnsboro*, supra; *Sears, Roebuck and*

Company v. City of New Orleans, supra; *Banjavich v. Louisiana Licens. Bd. for Marine Divers*, supra; *City of Shreveport v. Schultz*, 154 La. 899, 98 So. 411 (1923); *State v. Barba*, 132 La. 768, 61 So. 784, 45 L.R.A., N.S., 546 (1913); *City of Shreveport v. Levy*, 26 La. Ann. 671, 21 Am.Rep. 553 (1874); *Terry Carpenter, Inc. v. Wood*, 177 Neb. 515, 129 N.W.2d 475 (1964); Rhyne, *Municipal Law* §26-13, pp. 542-543 (1957); McQuillin, *Municipal Corporations* §18.18, pp. 441-443 (3d ed. 1949); 16 Am.Jur. 2d, Constitutional Law, §503, pp. 881-882.

Accordingly, if the statute (1) unreasonably discriminates between those engaged in the same business and/or (2) contains classifications resting on grounds wholly irrelevant to the achievement of the State's objective, it is constitutionally infirm.

Drugstores in 1981 are no longer the apothecary shops of the 19th century, and modern supermarkets sell more than milk, bread, and necessary staples. These stores have become home and garden centers, department stores, bakeries, delicatessens, among others.

A review of plaintiff's exhibits shows that many items sold by plaintiff's hardware stores are also offered by grocery and drugstores. Very few of these items fall into the prohibited categories of La. R.S. 51:194, i.e., lumber, building supply materials, furniture, home, business or office furnishings, or household, office or business appliances. Consequenctly, drugstores and grocery stores are permitted to sell merchandise on Sunday under Sec. 192, without

violating the prohibitions of Section 194. Plaintiff's affidavits show that in the three to five mile trading area of each of plaintiff's locations there are 16 major drug and grocery stores which carry the same and/or similar merchandise as plaintiff. In one instance, a competitor, Eckerd Drugs, is directly across the street and open on Sundays.

The evidence convinces us that plaintiff is in a business similarly situated to grocery and drugstores.

To permit drugstores and grocery stores to be open on Sunday and sell their *non-drug* and *non-food* stock while hardware stores carrying the same and/or similar merchandise are required to be closed constitutes invidious discrimination against hardware stores and is patently discriminatory.

The second requisite, that the classification established by the State must rest on ground relevant to achievement of the State's purpose, is also absent. The courts have long recognized the promotion of health, recreation and welfare to be a valid governmental purpose of the Sunday closing law. *McGowan v. State of Maryland*, supra. The legitimacy of this objective is not questioned by this court. The question we must resolve is whether classifications in the statute rationally further the state's ordained purpose.

The original concept is that closing of all business houses on Sunday, except in cases of emergency, bears a reasonable relationship to the general welfare because protection is afforded to all citizens from the possible evils of uninterrupted labor. It doesn't follow that laws containing the exemption of so many businesses, such as our statutes under consideration, can be said to bear such relationship to the public health, safety, morals or general welfare as to declare them to be valid general laws simply because they operate equally upon all within a certain class or classes. It is necessary that there will be a valid and substantial reason to make such laws operate only upon certain classes rather than generally upon all.

It is not suggested that parties who work in hardware stores need protection from uninterrupted labor more than do citizens who are engaged in any of the exempt businesses or vocations. We can think of no reason why health, safety, morals or general welfare of our people would be better safeguarded by requiring hardware stores to close on Sunday than such rights or guarantees would be safeguarded were such persons allowed to do business on the Sabbath along with proprietors of tourist attractions in the French Quarter. Such distincitons are nebulous, arbitrary, and made without a reasonable basis for holding them as a valid exercise of the police power. Indeed, each of these distinctions fits into the category of a distinction without a difference. It is necessary that there be a valid and substantial reason to make such laws operate only upon certain classes rather than generally upon all.

Our statute specifically states the purpose for which it was enacted in Subsection C of Section 194:

> "The purpose of this Section being to promote the health, recreation and welfare of the people of this state *and to prevent unfair competition among persons, firms, or business* establishments..." (Emphasis added)

We note that Louisiana cases on this point, particularly the recent case of *State v. Scallion*, supra, relied upon by the district court, have either failed to discuss or given ostensible treatment to the fact that Subsection C of Section 194 states a two-fold purpose.

In the instant case, it is unquestioned that the distinction between hardware stores on one hand and drug and grocery stores on the other, are classifications which create unfair competition rather than prevent it. The poor record of uniform enforcement throughout the State will not improve. Experience has taught mankind that the retention of unenforceable laws which are universally violated, breeds contempt for the law in general.

We conclude that the classifications established by the legislature rest on grounds wholly irrelevant to the achievement of the State's objective to promote the health, recreation and welfare of its people.

The distinction between hardware stores and grocery/drugstores is arbitrary and without any relation to public health, recreation and welfare. If the purpose of the statute is prevention of unfair competition, then that purpose has failed in reality.

We hold that La. R.S. 51:191-194, the Sunday closing law, is manifestly unconstitutional and that a permanent injunction should issue as prayed for. For the foregoing reasons the judgment of the District Court is reversed and set aside and this matter is remanded for issuance of the permanent injunction in accordance with the views hereinabove expressed. All costs are to be paid by appellees.

APPENDIX "C"
CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

No. 80-3488

REASONS FOR JUDGMENT

Plaintiff, Harry's Ace Hardware (and intervenor, BBC Sales Group, Inc.), seek to have the Court issue a temporary and a permanent injunction enjoining the defendants, James C. Parsons, Superintendent of Police, Harry F. Connick, District Attorney for the Parish of Orleans, and William J. Guste, Jr., Attorney General for the State of Louisiana, form enforcing the provisions of the "Sunday Closing Law," La. R.S. 51-191-194.

Plaintiffs contend that "the Sunday Closing Law"

> "Invidiously discriminates between persons and corporations in the same business — all of which deprives petitioners of the equal protection of the law, in violation of their rights under the Constitution of the United States and of the State of Louisiana." (Article 15, Harry's Hardware, Inc. petition).

An exception of "Lack of Jurisdiction over the subject matter" has been filed by Mr. Parsons and Mr. Connick, in their respective capacities, and joined in by the Attorney General, Mr. Guste. The exception is founded upon the legal premise that a civil court lacks jurisdiction to enjoin enforcement of a criminal statute. The law is clear that their contention is well-founded, unless the complaining party can establish the following three conditions:

1. A clear invasion of a property right,
2. The threat of irreparable injury, and
3. The manifest unconstitutionality of the statute sought to be enjoined.

While plaintiffs may be able to establish the first two conditions, they can only establish the last condition provided that the Court could hold that the "Sunday Closing Law" was "manifestly unconstitutional."

Inasmuch as this question of unconstitutionality is the basis upon which plaintiffs seek injunctive relief, it would appear to the Court that, from a procedural standpoint, it would be best to refer the exceptions to the merits and determine whether or not the plaintiffs have any basis for seeking injunctive relief.

The jurisprudence appears to be clear as to the constitutionality of the "Sunday Closing Law", the latest of a long line of both State and Federal decisions being the case of

State of Louisiana, Respondent, versus Morris Scallon, Realtor, 374 So.2d 1232, decided by a unanimous opinion of the State Supreme Court on September 4, 1979, in which it is stated:

> "In rejecting contentions similar to the present that the Sunday closing law denies due process and equal protection to the owners of the businesses so regulated, the courts have consistently held that a Sunday-closing regulation such as here attacked is a reasonable governmental restriction of business operations legislatively enacted in the interest of the health, recreation, and welfare of the working population. McGowan v. State of Maryland, 366 U.S. 420, 81 S.Ct. 1101 (1961); State v. Wiener, 245 La. 889, 161 So.2d 755 (1964). See also City of New Orleans v. Dukes, 472 U.S. 297, 96 S.Ct. 2513 (1976).
>
> "We therefore find no merit to the defendants' attack upon the constitutionality of the Sunday closing statute."

There can be no doubt that inequities exist, in that those establishments and businesses which are exempt from the provisions of the "Sunday Closing Law" may (and undoubtedly do) offer for sale many of the same items which

petitioner and intervenors offer for sale. As set forth in the memorandum of the Attorney General, the Courts have held:

> "To establish arbitrary discrimination inimical to constitutional equality, there must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity (*Mackay; Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350). Thus, the Supreme Court has stated that the unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination, which may appear on the face of the action taken with respect to a particular class of persons, or may be shown by extrinsic evidence establishing a discriminatory design to favor one individual or class over another, not to be inferred from the action itself (*Snowden v. Hughes*, 321 U.S. 1). But a discriminatory purpose is not presumed; there must be a showing of clear and intentional discrimination (*Snowden v. Hughes* 321 U.S. 1)."

It is not alleged by either plaintiff or intervenor that Mr. Parsons, Mr. Connick or Mr. Gusto, either personally or

in their official capacities, are attempting to enforce the law specifically against them in an arbitrary and/or discriminatory manner. These gentlemen, in their official capacities seek only to do what the law calls on them to do.

The obvious remedy for the correction of the existing inequities lies with the Legislature. If the Act is too broad in its description of those who are not covered by the Act's provisions, or if it is necessary to more clearly define the types of businesses which are to be excluded from the Act's provisions, the Legislature must be addressed on that subject matter.[1] "Courts do not make laws — they can only interpret and enforce them." In this case the Court is unable to find that the facts, as stated — the law as written — and any inequities which do exist — are sufficient to declare the Act unconstitutional, especially based upon the jurisprudence as it now exists.

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[1] Plaintiff does have other relief afforded to it by the statute, Section R.S. 51:194 (C), which provides as follows:

> "***the operation of any business*** in contravention of the provisions of this Section is declared to be a nuisance, and any person may apply to any court of competent jurisdiction for and may obtain an injunction restraining such violation."

Mandamus proceedings *may* also be available, if those whose ministerial duties provide for enforcement of the laws as written are not being performed.

(Section (3) of 51:194, as amended, would permit the sale of most items plaintiff wishes to sell on Sunday if he chose to have a store in the Vieux Carre section of New Orleans).

For the reasons hereinabove set forth the Court must refuse to issue either a temporary or a permanent injunction, as prayed for by plaintiff and intervenor. The Temporary Restraining Order heretofore issued must be revoked as of the time of signing of this Judgment, the same having heretofore been extended.

New Orleans, Louisiana, on this 25th day of March, 1980.

S. Stanford Levy
JUDGE

APPENDIX "D"

Louisiana Revised Statutes, LSA-R.S. 51:191

All stores, shops, saloons, and all places of public business, licensed under the law of Louisiana or under any parochial or municipal law and all plantation stores, shall be closed at twelve o'clock on Saturday nights, and remain closed continuously for twenty-four hours, during which time no proprietor thereof shall give, trade, barter, exchange or sell any of the stock or any article of merchandise kept in his establishment.

Whoever violates this Section shall be fined not less than twenty-five dollars nor more than two hundred and fifty dollars, or imprisoned for not less than ten days nor more than thirty days, or both for each offense.

Louisiana Revised Statutes, LSA-R.S. 51:192

The provisions of R.S. 51:191 shall not apply to newsdealers, the sale of ice, watering places and public parks, places of resort for recreation and health, newspaper offices, keepers of soda fountains, printing offices, book stores, art galleries insofar as sales of original art and prints constitute a substantial portion of their operation, drug stores, apothecary shops, undertaker shops, public and private markets, bakeries, dairies, livery stables, railroads, whether steam or horse, hotels, boarding houses, steamboats and other vessels, warehouses for receiving and forwarding freights,

restaurants, telegraph offices and theatres, or any place of amusement, unless intoxicating liquors are sold in the premises. Stores may be opened for the purpose of selling anything necessary in sickness and for burial purposes.

Hotels or boarding houses may sell wine for table use on Sundays. No alcoholic, vinous or malt liquors shall be given traded or bartered or sold or delivered in any public place on Sundays, except when administered or prescribed by a practicing physician in the discharge of his professional duties. In which case the physicians administering the intosicating liquors may charge therefor.

Louisiana Revised Statutes, LSA - R.S. 51:194:

A. On the first day of the week, commonly designated as Sunday, it shall be unlawful for any person, whether at retail, wholesale or by auction, to sell, attempt to sell, offer to sell or engage in the business of selling, or require any employee to sell any clothing or wearing apparel; lumber or building supply materials; furniture; home or business or office furnishings; any household, office or business appliances; new or used automobiles and trucks or parts for and servicing of such motor vehicles in all places of business wherein such motor vehicles are sold. In the case of an emergency, parts and servicing may be sold.

B. Whoever violates any provision of this Section shall be fined not more than one hundred dollars for the first offense. If it is shown upon the trial of a case involving a

violation of this Section that the defendant once before has been convicted of this same offense, he shall, upon a second conviction and upon each subsequent conviction, be imprisoned for not more than six months or be fined not more than five hundred dollars, or both.

C. The purpose of this Section being to promote the health, recreation and welfare of the people of this state and to prevent unfair competition among persons, firms or business establishments, the operation of any business, whether by an individual, partnership or corporation, in contravention of the provisions of this Section is declared to be a nuisance, and any person may apply to any court of competent jurisdiction for and may obtain an injunction restraining such violation.

D. A sale of an item falling within the categories enumerated in Subsection A of this Section by persons not engaged in the business of selling such an item shall be exempt from the operation of this Section.

E. The provisions of this Section shall not apply to any sale or sales:

(1) for charitable purposes: or

(2) Of items for funeral or burial purposes; of items sold as a part of or in conjunction with the sale of real property or mobile homes; or of

drugs, medicines, medical or surgical supplies and appliances.

(3) of clothing or wearing apparel, new and used furniture, new and used home or business or office furnishings, or any new or used household, office or business appliances in the Vieux Carre section of the city of New Orleans being that section of the city bounded by Iberville Street, North Rampart Street, Esplanade Avenue and the Mississippi River.

NO. 81-2299

FILED

SEP 4 1982

ALEXANDER L. STEVAS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

HARRY'S HARDWARE, INC.

Petitioner

VERSUS

JAMES C. PARSONS, SUPERINTENDENT OF POLICE, ET AL

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF OF THE STATE OF LOUISIANA IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA
WARREN R. MCGLOTHLIN
FIRST ASSISTANT ATTORNEY GENERAL
KENDALL L. VICE
ASSISTANT ATTORNEY GENERAL
HERBERT J. CALLAIS
ASSISTANT ATTORNEY GENERAL
LOUISIANA DEPARTMENT OF JUSTICE
234 LOYOLA AVENUE, 7TH FLOOR
NEW ORLEANS, LOUISIANA 70112

QUESTIONS PRESENTED FOR REVIEW

May the Louisiana Legislature constitutionally promulgate a Sunday Closing Law scheme by mandating that all places of public business be closed on Sunday, while some types of businesses are exempted from that general prohibition.

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STATEMENT OF THE CASE

On March 7, 1980, Harry's Hardware, Inc. filed suit in Civil District Court for the Parish of Orleans, State of Louisiana, against James C. Parsons as Superintendent of Police for the City of New Orleans and Harry Connick as District Attorney for Orleans Parish, State of Louisiana, seeking to enjoin the enforcement of Louisiana Revised Statute 51:191 to 194, commonly termed the "Sunday Closing Law."

The City of New Orleans filed an exception of lack of jurisdiction over the subject matter alleging that a civil in-

junction cannot lie against a criminal statute unless, *inter alia*, that statute was manifestly unconstitutional. The State of Louisiana joined in that exception and urged the district court to find the statute constitutional.

The district court denied plaintiff's application for a preliminary injunction and dissolved its temporary restraining order. In his Reasons for Judgment, Judge Sanford Levy held that Louisiana's Sunday Closing Law was not manifestly unconstitutional and, therefore, an injunction of the criminal statute could not issue.

Shortly after that judgment was rendered, plaintiff, Harry's Hardware, Inc., applied to the Fourth Circuit Court of Appeal for the State of Louisiana for supervisory writs, which were denied.

Plaintiff then appealed to the Fourth Circuit Court of Appeal, Louisiana's intermediate appellate body. On May 19, 1981, a five judge panel of that court rendered its opinion and declared Louisiana's Sunday Closing Statute (R.S. 51:191-194) unconstitutional and remanded the matter to the district court for issuance of a permanent injunction.

The State of Louisiana appealed that court's decision to the Louisiana Supreme Court. On January 25, 1982, that court rendered its opinion and by a four to three margin held Louisiana's Sunday Closing Law constitutional.

SUMMARY OF ARGUMENT

A. Louisiana's Sunday Closing Law does not violate the Equal Protection Clause of the Fourteenth Amendment because that statute seeks to achieve a legitimate state object by utilizing a rationally related means to achieve that end.

B. The different treatment accorded hardware stores does not constitute invidious and unlawful discrimination.

C. Louisiana's Sunday Closing Law is a proper exercise of the state's police power and legislative prerogative.

ARGUMENT

A. Louisiana's Sunday Closing Law Does Not Violate the Equal Protection Clause of the Fourteenth Amendment Because That Statute Seeks to Achieve a Legitimate State Object by Utilizing a Rationally Related Means to Achieve That End.

The objective of Louisiana's Sunday Closing Law is clearly stated at La.R.S. 51:194(C):

> "the purpose of this section being to promote the health, recreation and welfare of the people of this state and to prevent unfair competition among persons, firms or business establishments..."

Louisiana's courts have interpreted that objective consistently and in light of its plain meaning. In

Louisiana v. Scallon, 374 So.2d 1232 (La. 1979), the Louisiana Supreme Court held:

> "In rejecting the contention similar to the present that the Sunday Closing Law denies due process and equal protection to owners of a business so regulated, the courts have consistently held that a Sunday Closing regulation such as here attacked is a reasonable governmental restriction of business operations legislatively enacted in the health, recreation and welfare of the working population. *McGowan v. State of Maryland*, 366 U.S. 420; *State v. Weiner*, 161 So.2d 755; see also *City of New Orleans v. Dukes*, 427 U.S. 297."

The validity of this objective has not been subject to dispute in these proceedings as a valid exercise of police power. Courts at every level in all parts of the country have recognized a legislature's authority to mandate a forced day of rest.

> "The courts recognize the validity of Sunday statutes as civil, municipal, or police regulations, and also that the state has the power to provide a weekly respite from all labor, (*Hennington v. Georgia*, 163 U.S. 299) and at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation, and tranquility. (*Braunfield v. Brown*, 366 U.S. 599; *McGowan v. Maryland*, 366 U.S. 420. The need to provide for one day of rest at periodic intervals has been recognized by legislative enactments, both state and federal (*Land v. McFadden*, 66 So.2d 83, *Rogers v. State*, 4 So.2d 918), and the adoption of such laws has been uniformly recognized as a legitimate exercise of the police power." 73 *American Jurisprudence* 786.

The question, therefore, becomes whether or not the classifications utilized by the statute are wholly irrelevant to the achievement of the statute's legitimate objective.

The statute enacted in 1886 provides at R.S. 51:191 that:

> "All stores, shops, saloons, and all places of public business, licensed under the law of Louisiana or under any parochial or municipal law and all plantation stores, shall be closed at twelve o'clock on Saturday nights, and remain closed continuously for twenty-four hours, during which time no proprietor thereof shall give, trade, barter, exchange or sell any of the stock or any article of merchandise kept in his establishment."

The rule of the Louisiana Sunday Closing Law is that *all* businesses must close their doors on Sunday. This statutory requirement is followed by the vast majority of business operations in the State of Louisiana. There has been no evidence to the contrary that the exceptions to this rule have become broader and more extensive than the rule itself. The law is clear that a party seeking to have a statute declared unconstitutional bears the burden of proving the infirmity that renders the law void. Petitioner has not substantiated at the trial court that most of Louisiana's work force is actively engaged in their employment on Sunday or that most businesses operate on Sunday, as the petitioner did in *Caldar's v. Bedding Bard, Inc.*, 417 A.2d 343 S.Ct. of Conn., 1979, see p. 353, where the Connecticut Supreme Court found that state's Sunday

Closing Law unconstitutional. The petitioner's failure to prove that Louisiana's law is not rationally related to a legitimate state objective vindicates the constitutionality of La.R.S. 51:191 et seq.

The Louisiana legislature, in its wisdom and utilizing its legislative prerogatives, has determined that to satisfy the purpose of the Sunday Closing Law and to provide for the health and welfare of the general public, it must also allow certain business operations to remain open on Sunday while mandating that most must be closed.

Consequently, at R.S. 51:192 the statute provides that the prohibition is inapplicable to, *inter alia*, news dealers, restaurants, drugstores, railroads, public and private markets, hotels, theaters, or any place of amusement. The list of exemptions was expanded somewhat by the Louisiana legislature in 1972 and 1977 when it stated that medical supplies may be purchased as well as items for funeral or burial purposes, the sale of realty or mobile homes, and created a special exemption for the Vieux Carre.

Despite the few exemptions created by statute to the mandated closing, appellee has never proved nor can substantiate that most businesses operate on Sundays to such an extent that the purpose of the Sunday Closing Law, to provide a forced day of rest for the majority of Louisiana's working population, has been overwhelmed by the exceptions created to it. Without a doubt the classifica-

tion of the great preponderence of business operations as non-exempt activities is a classification rationally related to the objective of guaranteeing a day of rest for the majority of Louisiana citizens.

Because the means employed by the statute to achieve a legitimate state interest are rationally related to that end, the classifications created are not violative of petitioner's equal protection rights. This court has penned this principle on multiple occasions, as in *McGowan v. Maryland*, 366 U.S. 420, 6 L.Ed. 393 81 S.Ct. 1101 (1961):

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classifications rests on grounds wholly irrelevant to the achievement of the states' objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

This principle was amply supported by this honorable court's holding in *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513 (1976):

> "Unless a classification tramples fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or

> alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."

Petitioner has never alleged that Louisiana's legislative scheme creates a suspect class of "hardware stores and has not evidenced or argued that the statute tramples a "fundamental personal right." Consequently the test applicable is that of mere "rationality". The Louisiana statute in question abundantly satisfies that test.

B. The Different Treatment Accorded Hardware Stores Does Not Constitute Invidious and Unlawful Discrimination.

Although petitioner is treated differently from exempt retail outlets permitted to operate on Sunday, that treatment is not as harsh and extensive as petitioner would have the court believe.

Petitioner has framed its "Question presented for Review" in its Petition for Certiorari in such a manner to lead the court to conclude that petitioner substantiated at trial that most of the items constituting the stock in trade of hardware stores were sold on Sundays by drug and grocery stores open on that day. A review of the affidavits indicates that such proof was not submitted to the trial court or placed in evidence. Petitioner has failed to carry its burden of proof in vindicating the unconstitutional nature of the laws in question.

Indeed the opposite of what petitioner asserts is true. Harry's Hardware is a traditional hardware outlet with most of its stock constituting lumber or building supply materials, home or office furnishings and household or business appliances. These items are specifically prohibited from sale on Sunday by any type of outlet (see La.R.S. 51:194A). Consequently even if Harry's Hardware were permitted to open on Sunday, it would not be permitted to offer for sale the majority of its stock.

There is no doubt that hardware stores are treated differently from drugstores in the eyes of Louisiana's Sunday closing statute. This different treatment does not, however, constitute discrimination of such an unreasonable and invidious nature as to render the statute constitutionally infirm. Not every discrimination promulgated by statute is unconstitutional.

> "It is well settled that 'the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution.' *Williams v. Rhodes*, 1968, 393 U.S. 23. Thus, as a general rule, a law is not violative of Fourteenth Amendment, *despite the existence of discrimination in the technical or broad sense*, where the law at issue maintains some rational connection with a legitimate state interest." *Farbush v. Wallace*, 341 F.Supp. 217, 1971. (Emphasis supplied.)

By its very nature, a law must treat one class or type of persons differently from another class of persons and therefore "discriminate". The question at issue is whether

or not the statute invidiously discriminates or discriminates in an unreasonable and unjustifiable manner against hardware stores. This Honorable Court in *Williams v. Rhodes, supra*, Justice Black writing for the Court, held that:

> "It is true that this Court has firmly established the principle that the equal protection clause does not make every minor difference in the application of laws to different groups a violation of our constitution. But we have also held many times that invidious distinctions cannot be enacted without a violation of the equal protection clause. In determining whether or not a state law violates the equal protection clause, we must consider the facts and circumstances behind the law, the interest which the state claims to be protecting, and the interests of those who are disadvantaged by the classification. *Carrington v. Rash*, 380 U.S. 89 (1965). See also *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 408 U.S. 920 (1973)"

In *Rinaldi v. Yeagear*, 384 U.S. 305 (1966), this Honorable Court held that

> "To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. 'The constitution does not require things which are different in fact...to be treated in law as though they were the same'."

Clearly, hardware stores are treated differently from grocery or drugstores because they *are different*. They are primarily engaged in the sale of building materials, specifi-

cally prohibited by Louisiana's Sunday Closing Law, while drug and grocery outlets are primarily engaged in their separate and distinct enterprises.

If a Sunday Closing Law exists and is a valid exercise of the state's police power even petitioners would hopefully concede that certain types of stores should remain open while most close. Clearly it is a legislative determination to ascertain which stores are to be open and which closed. The fact that Louisiana's legislature decided that hardware stores shall be closed while grocery stores remain open does not constitute an invidious and unreasonable discrimination against hardware outlets.

C. Louisiana's Sunday Closing Law is a Proper Exercise of the State's Police Power and Legislative Prerogative.

Clearly, the Louisiana legislature has ascertained that the Sunday Closing Law is necessary for Louisiana and that the exceptions promulgated to the general shutdown rule are also necesary to provide for the health, welfare and recreation of the public on Sunday. This legislative option and prerogative should not be interfered with by the courts. This Honorable Court in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), held that

> "When local economic regulation is challenged solely as violating the equal protection clause, this court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. See, e.g., *Lee Lehn Hausen v. Lakeshore Auto Parts Co.*, 410 U.S.

> 356 (1973). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economics under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. ... In short the judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. E.g., *Daybright Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952); in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act which cannot stand consistently with the Fourteenth Amendment. *Ferguson v. Skrupa*, 372 U.S. 726 (1963)."

The exemptions created by the statute are those that the legislature felt were justified to safely provide for the welfare of the public while mandating a forced closing of most businesses. The legislature exempted restaurants and public markets because people need to procure food on Sunday; they exempted drugstores because people need to procure drugs and other medical supplies on Sunday; they exempted funeral houses because people cannot avert the inevitability of death on Sunday; they exempted hotels because out-of-town visitors need someplace to reside; they exempted theaters because the opening of theaters is consistent with providing a day of rest and recreation; they

exempted newspaper offices because the legislature felt that the public needed to be informed on Sundays. There is a legitimate and rational justification for all of the exemptions contained in Louisiana Sunday Closing Law that is consistent with providing for the general welfare of the public while enforcing a day of rest and recreation for the vast majority of Louisiana's public.

The legislature simply decided not to exempt hardware stores from the general Sunday shut-down rule. That decision does not render the statute unconstitutional. It is a legislative prerogative to ascertain which stores should and should not be open. So long as that determination by the legislature is not arbitrary or totally unrelated to its stated purpose, the decision is valid and stands any constitutional assault.

As this Honorable Court stated in *Massachusetts v. Morgia*, 427 U.S. 307 (1976):

> "...the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. .. Such action by a legislature is presumed to be valid."

The Louisiana legislature has not acted irrationally in creating its "lines of distinction" and has legitimately and constitutionally exercised its police power.

CONCLUSION

This Honorable Court should deny petitioner's request for a writ of certiorari because it has failed to evidence that the Louisiana Sunday Closing Law (R.S. 51:191 et seq.) is unconstitutional. Petitioner has not substantiated any fact in support of its claim that Harry's Hardware, Inc. has been denied equal protection of the law or has been unlawfully discriminated against.

Harry's Hardware has presented no evidence that most of Louisiana's public businesses are open on Sunday; that most of Louisiana's work force engages in their employment of Sunday; that the majority of its stock is sold by grocery or prescription drug outlets on Sunday or even that if Harry's Hardware were open on Sunday it could lawfully sell a major portion of its stock.

In absence of any evidence to substantiate the above, Harry's Hardware has failed to vindicate its claim of denial of equal protection.

Even if Harry's Hardware were able to substantiate some or all of the above factual conclusions, Louisiana's Sunday Closing Law is constitutional because the means utilized are rationally related to the legitimate state objective sought to be realized.

In absence of the creation of a suspect classification or fundamental interest infringement (neither situation

exists in the case at bar), the mere rationality test is to be applied, and as indicated above, is satisfied by Louisiana's Sunday Closing Law.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

WARREN E. MOULEDOUX
FIRST ASSISTANT ATTORNEY GENERAL

KENDALL L. VICK
ASSISTANT ATTORNEY GENERAL

BY: _____
ROBERT J. CALUDA
ASSISTANT ATTORNEY GENERAL
LOUISIANA DEPARTMENT OF JUSTICE
234 LOYOLA AVENUE, 7TH FLOOR
NEW ORLEANS, LOUISIANA 70112
PHONE: (504) 568-5575